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SUPREME COURT, U.S.

No. 97-1875

In The

Supreme Court of the United States

October Term, 1997

A.J. WREN and JERRY WREN,

Petitioners,

vs.

JIM TOWE and JAY NORRIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI CONFIRMS THE NEED FOR THIS COURT TO GRANT THE WRIT OF CERTIORARI

Respondent Norris' Brief in opposition is actually the best argument for this Court to grant the Writ of Certiorari. Virtually all the facts that Norris has placed in his "statement of facts" were not admitted as true or accurate by the Petitioners but rather were hotly contested by them. In response to Norris' and Towe's Motion for Summary Judgment wherein they claimed entitlement to qualified immunity, the Petitioners presented evidence that challenged the truthfulness of Towe's and Norris' assertions and/or contradicted Norris' and Towe's basis for the seizure of the Wrens' truck and the Respondents' claims to immunity. E.g. (the following examples should not be considered to be inclusive):

> A. In the summary judgment proceeding the Petitioners presented affidavits that demonstrated that there was observable evidence of the repair to the truck body including the body damage related to the removal of opera lights, etc. Towe and Norris told Justice of the Peace Kurbin that they had removed the "headliner" from inside the cab and found no evidence of holes left by the removal of the opera lights, etc. This claim was disputed by the Petitioners and the Petitioners' evidence was that a removal of the headliner would evidence repair of the damage caused by the removal of the opera lights, etc. Towe and Norris also claimed that they found no evidence of repair to the left floor of the truck. Jennifer Wren testified that she

observed Norris on the day of the seizure pull back the carpet on the left floor of the truck and observe obvious evidence of repaired damage.

B. Petitioners presented an affidavit from a former owner of the cab (Searcy) that was placed by the reconditioner on the Wren's truck. Searcy denied telling Norris that he sold the doors to this cab independent of the cab. Searcy denied telling Norris anything that was actually inconsistent with the cab's condition as it existed on the Wren truck. Searcy denied telling Norris anything about a GMAC repossession. In his affidavit Searcy also said that he showed Norris several photos taken of his truck before he sold the cab. These photos were the same ones Norris saw in the possession of a private investigator at the hearing before the Justice of the Peace on April 14, 1995. The implication of Norris' refusal to acknowledge that he had seen these photos before the hearing or the seizure was clear because they were not consistent with his plans to seize the Wren truck on March 16, 1995.

C. The Petitioners' evidence was that, with the exception of the use of Searcy's cab in the construction of the Wren's truck, there was no parts bearing "older dates".

D. The Petitioners presented evidence that there were no confidential VIN's and that there were no "confidential VIN's" removed or obliterated from the truck as Norris and Towe claimed.

Respondent Norris says the heart of the Wren's complaint is that the Wren's perception of the facts should control the outcome of Norris' application for summary

judgment. This is not the Wrens' position. The Wrens' position is that when facts supporting "probable cause" or even "arguable probable cause" or "qualified immunity" are contested, the Defendants and the Courts should not be able to ignore Rule 56 criteria and ignore facts that challenge the credibility of the applicants for qualified immunity. The Petitioners also state that the Court of Appeals should not be able to make factual findings while ignoring evidence that would not support its finding of qualified immunity.

The evidence viewed in a light most favorable to the opponent (here, the Wrens) in accordance with the requirements of Rule 56 Fed. R. Civ. P. established that the Wrens owned a truck that had been lawfully constructed (reconditioned) from parts primarily obtained from two trucks that were legitimately purchased and not stolen. The Wrens' truck had been inspected and cleared for evidence of illegal conduct by a law enforcement officer in March, 1994. This officer found no evidence of use of stolen parts and/or illegal conduct. Subsequent to the inspection the truck had been declared eligible by the State of Texas to be issued a new title and a new serial number. That the new serial number was issued because there were missing or obliterated VIN's (on the cab obtained from Searcy). The new serial number was placed in the driver's side door jamb and this number had not been tampered with in any manner. This new serial number replaced the VIN as the official serial number for the Wren truck. The Petitioners' evidence showed that long before their seizure Norris and Towe knew all of

these facts and that neither Norris nor Towe had discovered anything that was inconsistent with these facts. Further, the evidence showed that prior to their seizure, neither Norris nor Towe had uncovered anything that tended to show that the officer (Lt. Pothen) who inspected the Wrens' truck in March 1994, had done anything improper. Nor did Norris or Towe uncover any evidence that showed that the Wrens' truck had been constructed with stolen parts. An affidavit from Searcy (the former owner of the cab) disputed virtually everything Norris attributed to him. The Petitioners presented evidence that there were no missing "confidential VINs" and that encountering a motor vehicle with "missing VINs" is not really an uncommon occurrence. (E.g., the driver's side door on a Chevrolet truck has a VIN on the door. If this door is replaced due to damage, a new Chevrolet replacement door would have no VIN leaving the vehicle with a missing VIN.) The evidence viewed in proper Rule 56 perspective was also that the Petitioners' truck came to the attention of the Respondents on January 17, 1995, almost a full two months before the seizure of the truck on March 16, 1995; that Respondents had no warrant; that there was no exigent circumstance; and, that after the Respondents seized the truck, Towe filed a conclusionary affidavit devoid of any factual basis to justify the decision to seize. There is no dispute that the Petitioners were deprived of their vehicle from March 16, 1995 until August 23, 1995. The Petitioners' evidence was that if one gave all benefit of any doubt to Norris and Towe, it would not have taken more than an hour to conduct a very thorough inspection of the truck to confirm that it was what it was, a legitimate truck. The

Petitioners' evidence was that Towe and Norris lied to the Justice of the Peace on April 14, 1995 to cover up their realization that the vehicle was indeed legitimate and that they should not have seized it.

II. THE RESPONDENTS ARE NOT ACCURATELY PORTRAYING STATE LAW

In their brief the Respondents contend that Justice of the Peace Kurbin's determination of the seizure, etc. prohibits any re-examination of this issue. This is not an accurate statement of the law in Texas. Under Texas law, appeals under Texas Code of Criminal Procedure Chapter 47 are governed by the Texas Civil Rules pertaining to appeals from Justice Courts. Under Texas law such an appeal is a "de novo" matter meaning that all of the issues are retried in the County Court as if nothing had been determined in the Justice Court. Because the Petitioners appealed Justice of the Peace Kurbin's decision to award the truck to the State of Texas and because the Texas Attorney General, on behalf of the State of Texas, consented to an entry of a judgment in the County Court on August 23, 1995 returning the Wrens' truck to them, Justice of the Peace Kurbin's determinations have no binding legal meaning or effect. By entry of this County Court judgment, the clear implication is that Towe and Norris acted improperly. (See Tex. Code of Crim. Proc. Art. 47.12(b) and Tex. Rules of Civ. Proc. Rule 591.)

III. THE COURT OF APPEALS IMPROPERLY DETERMINED THAT THERE WAS "ARGUABLE" PROBABLE CAUSE

Because Norris and Towe had ample time to investigate and an ample amount of time to obtain a warrant (i.e., from January 17, 1995 until March 16, 1995) Norris' and Towe's decision to seize should have been governed by the same criteria as if Norris and Towe had actually sought and obtained a warrant. *See Malley v. Briggs*, 475 U.S. 335 (1986). The Supreme Court's summary disposition in *Hunter v. Bryant*, 502 U.S. 162 (1991) appears to the Petitioners, to have encouraged the Court of Appeals to reach out and find qualified immunity for officers who are not entitled to its protection.

No factors requiring any sort of immediate action on the part of either Towe or Norris were presented by their decision to seize. (Important considerations such as an arrest to avoid potential injury to the President of the United States were not present.) The evidence in this cause, viewed in a light most favorable to the Petitioners, was that the seizure of the Petitioners' truck was not done because of a need to seize but rather to further a dispute between another member of the same Task Force that Towe and Norris were members and the officer who inspected the Wrens' truck in 1994. (See recitation of these matters in the District Court's Opinion found in the Appendix to the Petitioners' Brief. See App. pp. 22-24.)

If there is such a thing as "arguable" probable cause as the Respondents' claim, and as Court of Appeals appears to accept in principle, if not by the use of this terminology, the Supreme Court should accept this case

for consideration in order to give guidance and direction as to how to know when "arguable" probable cause exists and when "arguable" probable cause should be applied to the determination of qualified immunity. Additionally, the Supreme Court should determine how to handle the evidence regarding "arguable" probable cause within the confines of Fed. R. Civ. P. Rule 56.

CONCLUSION

For the foregoing reasons in addition to the matters presented in their petition, A.J. and Jerry Wren request that their petition for a writ of certiorari be granted and that a writ of certiorari be directed to the United States Court of Appeals for the Fifth Circuit and that after hearing and consideration, that this Court then reverse the decision of the Court of Appeals and remand this cause to the District Court for trial.

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